

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 March 2003

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In the Matter of: :

LINDA TOMKIEL, Widow of
JOSEPH C. TOMKIEL, Dec'd,

Claimant,

v. :

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Respondent
.....:

Case Nos. 2002-BLA-394 and
2002-BLA-5349

George E. Mehalchick, Esquire
For the Claimant

Elizabeth L. Beason, Esquire
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

**DECISION AND ORDER – REJECTION
OF MINER’S REQUEST FOR MODIFICATION
AND SURVIVOR’S CLAIM**

Statement of the Case

This proceeding involves a request for modification of a now deceased miner’s claim, prosecuted by his widow, and a survivor’s claim for benefits under the Black Lung Benefits Act as

amended, 30 U.S.C. §§ 901 *et seq.* (“the Act”), and the regulations promulgated thereunder.¹ Since this claim was filed after March 31, 1980, Part 718 applies. §718.2. Because the deceased miner was last employed in the coal industry in Pennsylvania, the law of the United States Court of Appeals for the Third Circuit controls (D-2). *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(*en banc*). Because the Survivor’s claim was filed after Part 718 and Part 725 of the Regulations were amended, effective January 19, 2001, it is considered and decided under the amended regulations. 65 Fed. Reg. 80,045 (December 20, 2000).

The deceased miner, Joseph Tomkiel (the “Miner”), filed his first application for benefits under the Act on September 13, 1993 (D-1). His application was denied by the District Director on March 4, 1994, because he had not shown that he had pneumoconiosis, his pneumoconiosis was caused by coal mining work, or that he was totally disabled by pneumoconiosis (D-10).

The Miner filed a timely request for modification on August 18, 1994 (D-11). The claim was denied by the District Director on October 21, 1994, because his claim was not supported by any additional evidence and there was no mistake in a determination of fact (D-13). The Miner requested a formal hearing before an Administrative Law Judge on November 11, 1994 (D-15). The hearing was held before Administrative Law Judge Robert D. Kaplan on May 5, 1999 (D-36). The Director stipulated to the presence of pneumoconiosis arising from the Miner’s coal mine employment in its closing argument, dated July 1, 1999, but continued to contest that the Miner was totally and permanently disabled by a respiratory or pulmonary impairment due to pneumoconiosis (D-38). In the decision and order, dated July 23, 1999, Judge Kaplan denied benefits because the Miner had not established total disability from a respiratory or pulmonary condition (D-39). The Miner died on June 20, 1999 (D-49). In a letter dated August 16, 1999, the Miner’s estate submitted notice that it would pursue the now deceased Miner’s claim, and appealed Judge Kaplan’s decision and order to the Benefits Review Board (D-40). The Miner’s estate then filed a motion to remand on September 15, 1999, to allow consideration of the Miner’s autopsy report (D-43). On October 26, 1999, the Benefits Review Board dismissed the appeal and remanded the case as a request for modification to the District Director (D-44). Upon remand, the District Director again denied the claim for benefits after concluding that the newly submitted evidence did not establish a change in conditions or a mistake in determination of fact (D-51). The Miner’s estate requested a formal hearing before an Administrative Law Judge on March 17, 2000 (D-52).

The Miner’s wife, Linda Tomkiel (the “Claimant”), gave notice of an intent to file a claim for survivor’s benefits on May 7, 2001 while the Miner’s case was before the Administrative Law Judge (D-62). The survivor’s claim and the Miner’s claim were consolidated on May 15, 2001 (D-63). On May 22, 2001, the Director moved to vacate the order consolidating the two claims (D-64). This tribunal remanded the case to the District Director so that Claimant could file the survivor’s claim on the proper forms, and for possible consolidation for hearing (D-65). Claimant officially filed a

¹ All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director’s Exhibits are denoted “D-.”

survivor's claim on July 5, 2001 (D-67, 68). The District Director denied the claim for survivor's benefits on June 5, 2002, because Claimant did not prove that coal workers' pneumoconiosis caused the Miner's death (D-78). Claimant requested a hearing before an Administrative Law Judge on June 17, 2002 (D-80). The two claims were consolidated for hearing, the Claimant's motion for decision on written record in both cases was granted, and the scheduled hearing was canceled, by order dated December 2, 2002.

ISSUES

1. Whether the Claimant has proved the existence of a mistake in a determination of fact, or a change in conditions since denial of the Miner's claim on May 5, 1999?
2. Whether the Miner was totally disabled by a respiratory or pulmonary impairment?
3. Whether the Miner's total disability, if proved, was due to pneumoconiosis?
4. Whether pneumoconiosis was a substantially contributing cause or factor leading to the Miner's death?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Miner, Joseph C. Tomkiel, was born on March 31, 1931 and completed the ninth grade of education (D-1). The Miner married Claimant, Linda Tomkiel, on March 31, 1991, and they remained married until the Miner's death (D-1, D-67). This was the Miner's second marriage, but his first wife is not a party to the claim (D-36). While the Miner claimed to have worked in the coal mines for eight to nine years, the record supports Judge Kaplan's finding of six and a quarter years of coal mine employment (D-2, 4, 26, 39). The Miner last worked in the coal mine industry in 1955 (D-2).

The Miner died at his home on June 20, 1999. (D-49). The cause of death listed on the death certificate (Part I) was "anthrosilicosis of the lungs (coal miners lung pneumoconiosis) and cancer of the colon, metastatic." "Acute Respiratory Insufficiency" was listed separately as "other significant conditions contributing to death, but not resulting in the underlying cause given in Part I."

Evidence Submitted with Request for Modification and for Survivor's Claim

Dr. Mary F. Pascucci

In a very limited autopsy report, dated June 21, 1999, Dr. Pascucci reported "multiple tumors on...the parietal and visceral pleurae, which are white, firm and measure on average 0.8 cm." Cross sections of the lungs disclosed "numerous pigmented nodules through the parenchyma" which measured "on average[,] up to 1 cm. in greatest dimension," and were "numerous and close in proximity." In her microscopic examination of the evidence, Dr. Pascucci observed that the lungs demonstrated "acute pneumonia," "metastatic adenocarcinoma...to the lungs and pleural lymph nodes," and "background changes compatible with coal worker's pneumoconiosis." Dr. Pascucci diagnosed acute bronchopneumonia, metastatic adenocarcinoma to the lungs and regional lymph

nodes, and coal worker's pneumoconiosis. She did not assess any degree of disability or identify a cause of death. (D-47).

In her deposition on May 3, 2001, Dr. Pascucci opined that the Miner had simple pneumoconiosis and that the disease hastened his death. However, the reasoning was often confusing and not well articulated. Her statements were unclear and difficult, if not impossible, to understand, without some further explanation. She stated that the pigment she had observed grossly during the internal examination was "consistent with the anthracotic nodules that are developed with pneumoconiosis." Some of those nodules, she said, were actually larger than one centimeter when examined microscopically. Dr. Pascucci stated that she had not had access to any pulmonary function studies or x-rays necessary to give an opinion as to whether the Miner had complicated pneumoconiosis. While Dr. Pascucci had no knowledge of the Miner's smoking history, she found no evidence of exposure to any elements, occupational or otherwise, that would cause a respiratory or pulmonary disease, other than coal dust. (D-74)

Dr. Pascucci stated that "there was some degree of disability involved in this judging from the nodular aspect and the degree of tissue involved grossly and microscopically." She opined that "certainly, by the tissue [she] examined...there is some disability involved there." She opined that the Miner's degree of disability would have prevented him from engaging in his usual coal mining work, and thus would have constituted total disability, though she did not know "how he functioned prior to his death or years prior to his death." Evidently, she did not know what his usual coal mine work had been. Dr. Pascucci's review of a nonqualifying arterial blood gas study and a nonqualifying pulmonary function study obtained one month before the Miner's death, both of which were interpreted as close to normal, did not change her opinion that the Miner was disabled to some degree prior to his death, apparently due in part to pneumoconiosis. She seemed to suggest that a month before his death, the Miner did not have pneumonia, but had suffered changes in his lungs due to pneumoconiosis and metastatic carcinoma, which Dr. Pascucci suggested were inconsistent with the blood gas study and pulmonary function study she had reviewed. However, she admitted a lack of expertise with respect to such tests. (D-74).

Dr. Pascucci opined that the immediate cause of the Miner's death was pneumonia, and that pneumoconiosis hastened the Miner's death. She opined that the pneumonia, was "naturally brought on by the adenocarcinoma." Because the Miner had pneumoconiosis before the cancer spread to the Miner's lungs, the Miner had diseased lungs before contracting cancer, and the cancer put "a secondary disease on top of what is a primary disease," which would "make his lungs function at a lesser degree," so that pneumoconiosis "contributed to his death." Dr. Pascucci opined that, notwithstanding the degree of carcinoma and the shallow breathing caused by disabled lungs which predisposes people to fatal pneumonia, "[w]ithout the background of pneumoconiosis,...[the Miner] would have been better able to fend off a terminal disease or a terminal infection such as pneumonia." (D-74)

Dr. Pascucci, who has her degree in osteopathic medicine, is board-certified in anatomic and clinical pathology. (D-47).

Dr. Richard L. Naeye

In a report, dated May 15, 2000, Dr. Naeye reviewed Dr. Pascucci's autopsy report, twenty glass slides of the Miner's tissue, nineteen of which contained lung tissue, specified reports of chest x-rays, pulmonary function studies, and arterial blood gas studies, and records of ECGs. Dr. Naeye noted the existence of a smoking history, the Miner's history of colon cancer, and his 6.3 year history of coal mining, ending in 1955 at the age of forty-four. Dr. Naeye noted exertional dyspnea in the later years of the Miner's life, which was not pulmonary in origin, because the results of pulmonary function studies conducted in 1993, 1995, and 1999 were nearly normal and all the chest x-rays were read as 0/0, except one, which was read 1/0. (D-73).

Dr. Naeye noted that the two major abnormalities in the lungs were multiple nests of metastatic mucous secreting adenocarcinoma and a rapidly advancing acute lobular pneumonia. He noted a small amount of black pigment, almost all adjacent to small arteries and airways, and observed that one black pigment deposit was 1.2 millimeters in diameter, classifiable as an anthracotic micronodule, while the rest of the deposits, which were less than one millimeter in diameter, were classifiable as anthracotic macules. Dr. Naeye observed a small to moderate amount of collagen in the deposits and that thin rims of focal emphysema surrounded about one third of the black deposits. All of the deposits lacked tiny birefringent crystals and most of the smaller deposits lacked any fibrous tissue. Dr. Naeye noted that only one to two percent of the emphysema present in the lungs surrounded the black nodules, and the rest of the emphysema was centrilobular. Dr. Naeye opined that the emphysema was mild for a sixty-eight year-old man with a history of smoking, but noted that there was microscopic evidence of "chronic bronchitis," and not "chronic bronchiolitis." He observed two very old fibrotic lesions, not far from the pleural surface, largely comprised of irregularly arranged hyalinized collagen, but not admixed tiny birefringent crystals, which would suggest an infectious rather than a silicotic origin. The fact that one regional lymph node had only a small amount of black pigment and no significant fibrosis, while another had only a single hyalinized area within it, confirmed Dr. Naeye's opinion that the Miner's pneumoconiosis was mild, because any CWP lesions present would apt to be most severe in lymph nodes. (D-73).

Dr. Naeye opined that the Miner's lung tissue had the minimal findings required to identify the presence of simple coal workers' pneumoconiosis, because the lungs consisted of two anthracotic micronodules and a small number of macules with admixed fibrous tissues and rims of focal emphysema, which were too small and few in number to have caused any measurable impairments in lung function. He opined that they would not have caused any disability or contributed in any way to the Miner's death. Dr. Naeye opined that the results of the arterial blood gas study and pulmonary function test performed a month before the Miner's death confirmed his conclusions. Dr. Naeye attributed the Miner's death entirely to an adenocarcinoma that had metastasized to his lungs from his colon, which interfered with the normal defense mechanisms in his lungs and allowed development of a rapidly spreading acute lobular pneumonia. Dr. Naeye concluded that "despite the negative findings on chest X-rays[,] this man had the tissue findings in his lungs of mild, simple coal worker's pneumoconiosis," and that the pneumoconiosis was "far too mild to have caused any measurable abnormalities in lung function and too mild to have caused any disability or to have hastened his death." (D-73).

Dr. Naeye is board-certified in anatomic and clinical pathology. (D-73).

The Standard for Entitlement

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act and to certain of their survivors. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. It includes diseases recognized by the medical community as pneumoconioses, as well as any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant miner must prove by a preponderance of the evidence that: “(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability.” *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 B.L.R. 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 B.L.R. 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

Modification: Change in Conditions or Mistake in a Determination of Fact

Claimant’s request for modification of the prior denial of the Miner’s claim is governed by §725.310, which provides that any party may request modification of an award or denial of benefits if such request is filed within one year of the denial alleging a change in conditions or mistake in a determination of fact. A change in conditions as a ground for modification focuses on whether there has been a worsening of the Miner’s pulmonary disease to the point that it is totally disabling. In determining whether a change in conditions has occurred, an administrative law judge must “perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision.” *See Nataloni v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993); *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993).

Where mistake in a determination of fact forms the grounds for the modification request, new evidence is not a prerequisite, and a mistake of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on evidence initially submitted. *Kovac v. BCNR Mining Corporation*, 16 B.L.R. 1071 (1992), *modifying* 14 B.L.R. 1-156 (1990). Even if no specific mistake is alleged, but the ultimate determination of entitlement is challenged, the entire record must be examined for a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 B.L.R. 2-26 (4th Cir. 1993). In such circumstances, the administrative law judge, as trier-of-fact, has the authority, and the duty, to review the record evidence *de novo* and is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence. *See Nataloni v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992); *see also Jessee*, 5 F.3d at 725, 18 B.L.R. at 2-28; *see generally, O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

Review of New Evidence for a Change in Conditions

Claimant expressly asserts that a change in conditions justifies modification of the Miner's claim (D-43). Accordingly, because the Miner had not established that he was totally disabled by a respiratory or pulmonary impairment before Judge Kaplan, Claimant must establish an element of entitlement that was previously denied, in this case, that the Miner was totally and permanently disabled by a respiratory or pulmonary impairment due to pneumoconiosis at the time of his death, which might justify a modification of the prior denial of the Miner's claim and a review of the claim on the merits. The Director has stipulated to the presence of pneumoconiosis arising out of the Miner's coal mine employment (D-38, 39).

The newly submitted evidence consists of the autopsy protocol prepared by the prosector, Dr. Pascucci, and her deposition testimony, upon which Claimant relies almost exclusively, and the medical report by Dr. Naeye, submitted by the Director. That evidence, considered separately and together does not establish a change in conditions or that the prior denial involved a mistake in a determination of fact. Both Dr. Pascucci and Dr. Naeye are board-certified in anatomical and clinical pathology, but Dr. Naeye's curriculum vitae reflects more extensive experience and extensive publications in the field.

Dr. Pascucci's autopsy protocol was limited to the lungs, and incorporated only a very brief narrative description of her macroscopic observations and microscopic examination and a short list of her diagnoses. Although Dr. Pascucci noted, in addition to the evidence of cancer, "numerous pigmented nodules through the parenchyma," which she described as being in close proximity and measuring up to a centimeter in size, her microscopic examination merely confirmed that there were "background changes compatible with coal worker's pneumoconiosis" and presumably led to her diagnosis of coal worker's pneumoconiosis. The protocol disclosed no explicit or implicit findings with respect to the severity of the pneumoconiosis or any related disability.

Although Dr. Pascucci attempted to explain her findings in her deposition testimony, that testimony was confusing, seemingly inconsistent in some respects, such as her reliance, or lack thereof, on the results of clinical tests, and poorly articulated. Nevertheless, she opined explicitly that the Miner had simple pneumoconiosis and that the disease hastened his death. But her suggestion that her lack of access to pulmonary function studies or x-rays precluded an opinion regarding complicated pneumoconiosis, and her apparent lack of knowledge of the Miner's smoking history or the actual nature of his coal mine work, as well as her apparent failure or inability to review any medical tests or other medical records, except for the pulmonary function and blood gas tests performed a month before the Miner's death, which were characterized by Dr. Naeye as nearly normal and normal, respectively, indicate significant weaknesses in her opinion. Moreover, Dr. Pascucci's testimonial assessment of disability on the part of the Miner was equivocal in that she opined only that "there was some degree" of disability based on "the nodular aspect and degree of tissue involved grossly and microscopically." She did not explain how the condition of the tissue manifested disability, nor did she reconcile her suggestion of disability with the more or less normal clinical tests conducted a month before the autopsy, and admitted a lack of expertise in the interpretation of such tests.

Thus, Dr. Pascucci's opinions do not refute Dr. Naeye's assessment that the pneumoconiosis was too mild to be disabling or a cause of the Miner's death in the face of the evidence of advanced cancer which Dr. Pascucci stated naturally brought on the pneumonia that was identified as the immediate cause of death. Dr. Pascucci had access to Dr. Naeye's report based on the autopsy slides, but was not asked about it. The rationale for her opinion, that "[w]ithout the background of pneumoconiosis...[the Miner] would have been better able to fend off a terminal disease or a terminal infection such as pneumonia," was not supported by reasoned analysis related to clinical or other evidence, or even a detailed analysis of her autopsy findings. Thus her opinion that the Miner's pneumoconiosis was totally disabling at the time of his death and hastened his death is simply not convincing and is outweighed by the reasoned opinion of Dr. Naeye to the contrary.

Dr. Naeye based his opinion on his examination of the nineteen lung tissue slides from the autopsy and specified medical records pertaining to the Miner. He did not find any evidence that pneumoconiosis hastened the Miner's death. He concluded that the Miner's death was due entirely to his metastasized colon cancer, because the cancer weakened his immune system, allowing the pneumonia to affect his lungs and cause his death. Dr. Naeye observed only a small amount of black pigment, and the only deposit that was large enough to qualify as an anthracotic micronodule was 1.2 millimeters in diameter. The other nodules that he observed were less than a millimeter in size. He also cited, in particular, the minimal lesions in the Miner's lymph nodes as confirmation that the coal workers' pneumoconiosis was mild. He cited the normal pulmonary function tests and arterial blood gas studies, performed less than a month before the Miner's death, as indicating the absence of significant pulmonary disability. Thus, his conclusion that the simple pneumoconiosis evident from the autopsy results was too mild to have caused any disability or to have contributed in any way to the Miner's death, and that the Miner died from pneumonia caused solely by the cancer, is well documented and persuasively reasoned. As a result, Dr. Naeye's opinion has greater credibility than Dr. Pascucci's, and based on the new evidence, Claimant has not met her initial burden of establishing a change in conditions or mistake in determination of fact that would support a modification of the prior denial of that claim.

Review of the Record for a Mistake in Determination of Fact

Having reviewed the evidence of record before Judge Kaplan, when he issued his July 23, 1999 denial in light of the newly submitted evidence, this tribunal finds that Judge Kaplan correctly found that the Miner did not establish that he was totally disabled by a pulmonary impairment, and that there has been no mistake in a determination of fact. (D-39) The evidence before Judge Kaplan relevant to disability caused by pneumoconiosis consisted of four x-ray interpretations of two different films dated from December 1, 1995 through May 27, 1999, two of which were negative and two of which were positive 1/0, two nonqualifying arterial blood gas studies dated November 21, 1995 and May 27, 1999, three nonqualifying pulmonary function studies dated from November 8, 1993 to May 27, 1999, and the medical opinions of Drs. Davis, Kaufman, Sahillioglu, Wesner, and Spagnolo. Since Drs. Kaufman and Spagnolo are board-certified in internal medicine and the subspecialty of pulmonary disease, and Dr. Sahillioglu is board-eligible in those specialties, their opinions are weighted accordingly. Dr. Kaufman, who examined the Miner on November 21, 1995, found that the Miner had "borderline airways obstruction" and "borderline hypoxemia at rest," but no impairment was indicated by pulmonary function study or arterial blood gas study, including the

normal studies performed as part of his examination. Likewise, Dr. Sahillioglu's examination of the Miner disclosed no impairment that would prohibit him from performing his last coal mining job. Drs. Wesner and Davis, both of whom examined the Miner, did not comment on the Miner's degree of disability or ability to work his last coal mining job. Dr. Spagnolo's extensive review of specified medical records, for his report of March 23, 1996, did not support a finding of any pulmonary disability, coal workers' pneumoconiosis, or the inability of the Miner to perform heavy labor in his last coal mining job. Since all of the pulmonary function studies and arterial blood gas studies were interpreted as normal or only slightly below normal, essentially they were negative for pulmonary or respiratory impairment, and were not inconsistent with the opinions of the physicians who examined the Miner, the evidence before Judge Kaplan discloses no mistake in a determination of fact. It follows that the Claimant's request for modification based on a mistake in a determination of fact, with respect to the Miner's claim, must be denied.

Survivor's Claim

Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. §718.205(a). In order to receive benefits, the claimant must prove that: (1) the miner had pneumoconiosis; (2) the miner's pneumoconiosis arose, at least in part, out of his coal mine employment; and (3) the miner's death was due to pneumoconiosis as provided by the applicable part of §718.205. §718.205(a). As stated, Director stipulated to the Miner's pneumoconiosis arising out of his coal mining work (D-38, 39). Because this claim was filed subsequent to January 1, 1982, death is due to pneumoconiosis if any of the following criteria are met: 1) where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death; 2) where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis; or 3) where the presumption set forth at §718.304 is applicable. §718.205(c). Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. *Id.* Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. *Id.*

Death Due to Pneumoconiosis

§718.205(c)(2)–Pneumoconiosis as a Substantially Contributing Cause or Factor Leading to the Miner's Death

Under §718.205(c)(2), death is due to pneumoconiosis if pneumoconiosis was a substantially contributing factor in the death of the Miner or if death was caused by complications due to pneumoconiosis. The Claimant does not contend that the Miner died directly from pneumoconiosis, pursuant to §718.205(c)(1), or that the presumptions related to complicated pneumoconiosis apply pursuant to §718.304. Section 718.205(c)(5) provides that "pneumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death." *Shuff v. Cedar Coal Company*, 967 F.2d 977 (4th Cir. 1992). Complications of pneumoconiosis are not in issue. Both Dr. Pascucci and Dr. Naeye agreed that colon cancer was the primary cause of the Miner's death and that the Miner had pneumoconiosis, but disagreed on whether the pneumoconiosis hastened or otherwise

contributed to the Miner's death.

Based on the autopsy, Dr. Pascucci opined that the immediate cause of death was pneumonia brought on by the Miner's adenocarcinoma (D-74). Although Dr. Pascucci listed coal worker's pneumoconiosis and concluded that the Miner's death was hastened by the pneumoconiosis, in her autopsy report she only listed pneumonia, pneumoconiosis, and cancer as "final anatomical diagnoses," and did not opine on whether pneumoconiosis was involved in the Miner's death. Because she did not opine directly or indirectly in the autopsy report that the pneumoconiosis hastened the death of the Miner, her autopsy report has little probative value with regard to the cause of death. However, in her deposition, Dr. Pascucci declared that the Miner's death was hastened by pneumoconiosis, because the disease preexisted the cancer and weakened the Miner's lungs and made them more susceptible to the pneumonia caused by the Miner's cancer (D-74). Dr. Pascucci did not discuss the effect of the Miner's smoking history and she cited no clinical evidence, medical literature, or other basis to support her statement that the effects of the pneumoconiosis were sufficiently severe to have contributed to the Miner's death because of its weakening effect on the Miner's lungs, notwithstanding the apparently overwhelming effects of the terminal cancer and pneumonia. Greater weight may be given to the opinion of the doctor performing the autopsy over one who examines the slides. See *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982). However, Dr. Pascucci's stated conclusions are not well documented, well articulated, or well reasoned, and she does not show clearly what medical evidence she uses to support her conclusions.

In contrast, Dr. Naeye, whose superior professional qualifications and experience are evident from the record, examined medical records and tissue slides of the Miner, but did not find any evidence that pneumoconiosis hastened the Miner's death. He concluded that the death was due entirely to the Miner's colon cancer, because the Miner's cancer weakened his immune system, which then allowed the pneumonia that caused the Miner's death into his lungs (D-73). In his well documented and well reasoned opinion, Dr. Naeye opined persuasively, citing medical records as well as the particulars of the autopsy results, that the Miner's simple pneumoconiosis was too mild to have been a cause of the Miner's death. His credentials outweigh those of Dr. Pascucci, despite Dr. Pascucci's role as prosector. Consequently, his well reasoned explanation, as to why the Miner died from pneumonia caused solely by cancer and not significantly affected by pneumoconiosis, is persuasive.

Attorney's Fee

The award of an attorney's fee under the Act may be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

The request for modification of the prior denial of the Miner's claim and the Survivor's claim for black lung benefits are denied.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20001.